Supreme Court, U.S.
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(3)

No. 03-1226

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

BOBBY GENE HUNTER,
Petitioner,

vs.

GLENN A. MUELLER, et al,

Respondent.

On Petition for Writ of Certiorari
To The Ninth Circuit Court of Appeals

# REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Did the United States Court of Appeals for the Ninth Circuit err in denying Petitioner's request for a Certificate of Appealability based upon the finding that Petitioner has made no substantial showing of the denial of a constitutional right sufficient to be entitled to federal appellate review of the merits of his claims despite the substantial nature of the issues presented by Petitioner for appeal?

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## STATEMENT OF THE CASE

Petitioner herein brought this Petition for Writ of Certiorari on the issue of whether the United States Court of Appeals erred in denying Petitioner's Request for a Certificate of Appealability as Petitioner asserts his Petition for Writ of Habeas Corpus in the Eastern District Court satisfied the substantial showing required of the denial of a constitutional right sufficient to be entitled to federal appellate review of the merits of his claims.

On or about April 28, 2004, Respondent, by and through his counsel of record, filed a brief in opposition to the above-referenced Petition for Writ of Certiorari. Petitioner herein files the following reply to the Attorney General's brief in opposition to the petition.

## STATEMENT OF THE FACTS

Petitioner submits that his Due Process rights were violated because his plea was not made knowingly, voluntarily or intelligently.

Petitioner submits that his Sixth Amendment right to counsel was violated because he was denied effective assistance of counsel.

Petitioner submits that his right to counsel was violated when he was never fully informed of the consequences of his plea.

Petitioner submits that right to effective assistance of appellate counsel was violated.

## ARGUMENT

THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT ERRED IN DECLINING PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY BECAUSE PETITIONER HAS MADE A DEBATABLE SHOWING THAT HIS RIGHTS TO DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED.

Respondent correctly points out that in order to determine the appealability of a petition for writ of habeas corpus, the petitioner must demonstrate that a reasonable judge would find the district court's decision debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 338, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). In the instant case, however, Petitioner has made such a demonstration, and as such has made a substantial showing, both that his No Contest plea was involuntary, and that he received ineffective assistance of counsel.

### A. Petitioner's Guilty Plea was Invalid.

Respondent has asserted that a No Contest plea must be knowing, voluntary and intelligent; must be an intelligent choice among available alternatives; that a defendant must be informed of the charges against him and the maximum

exposure of any potential sentence; that the plea must be a knowing and intelligent waiver of constitutional rights; and the defendant must be competent to plead (Respondent at 5). All of Respondent's assertions are correct; however, none of the above requirements were present in Petitioner's No Contest plea, in that Petitioner was not determined to be competent to plead, and he was not properly advised of the nature and consequences of his plea. Therefore, Petitioner's No Contest plea cannot constitutionally be allowed to stand.

### 1. Petitioner Was Not Determined to be Competent to Plead No Contest.

It is not meaningfully disputed that during Petitioner's sentencing, his probation report contained evidence that he was under the influence of drugs and alcohol (See Respondent at 7). This fact alone creates a debatable issue that provides a proper basis for appeal under *Miller-El.* 537 U.S. at 338.

Respondent now argues that "nothing in the [probation] report ties this description [of intoxication] to the relevant time of the plea, and that Petitioner stated he was sober during the plea (Respondent at 7). However, despite Respondent's assertions, the very existence of this fact in the probation report is something that calls Petitioner's competency into question. Indeed, if there exists a serious possibility that Petitioner is incompetent, the judge is obligated to hold a competency hearing before accepting any plea. *Pate v. Robinson*, 383 U.S. 375, 385, 86 S. Ct. 836 (1966).

Further, Respondent's argument that Petitioner bears the burden of proving incompetence is irrelevant in the instant case. A competency hearing was never held, despite being ample evidence requiring the judge to hold such a hearing. Thus, there was never an opportunity to determine Petitioner's mental state, be it competent or otherwise, and the burden of proof does not bear on the issue.

The heart of this matter is that the judge was presented with evidence that Petitioner was under the influence of drugs and alcohol. Such evidence necessarily raises a doubt as to Petitioner's competency, which required the judge to hold a competency hearing. *Pate*, 383 U.S. at 385. This was not done, and Petitioner's right to due process was violated thereby. As such, Petitioner has raised a debatable issue regarding the district court's decision, and the Court of Appeals therefore erred in failing to grant Petitioner a Certificate of Appealability.

### 2. Petitioner Was Not Properly Advised of the Nature and Consequences of his No Contest Plea.

In order for a plea to be valid, a defendant must be informed of the nature of the charges against him. *Henderson v. Morgan*, 426 U.S. 637, 645, 96 S. Ct. 366, 369 (1976). The defendant must also know the consequences of his plea. *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969).

In the instant case, Respondent has asserted that no debatable issue arises from Petitioner's lack of understanding of his No Contest plea. Specifically, Respondent asserts that

Petitioner's trial attorney indicated in court that he had explained the elements of the offenses and the nature of the crime, and therefore there is no debatable issue for appeal (Respondent at 9-10). Respondent's argument, however, glosses over the fact that Petitioner, despite what his counsel may have told him regarding the plea, did not fully understand that pleading No Contest meant that he was admitting to malice. Further, Petitioner did not understand the nature of intent to kill and how it related to a plea of No Contest to a Second Degree Murder charge. Thus, regardless of what Petitioner signed, it is clear that he was confused as to what his plea really meant. As such, it is certainly debatable, indeed likely, that Petitioner was not properly advised of the nature and consequences of the plea. Therefore, the lower courts erred in refusing to issue a Certificate of Appealability.

**B. Petitioner Received Ineffective Assistance of Trial Counsel.**

Respondent argues extensively that Petitioner's evidence was insufficient to establish ineffective assistance of trial counsel, because his arguments were "conclusory and incredible" (Respondent at 12). Respondent oversimplifies the issue. In order to establish ineffective assistance of counsel, it must first be established that the attorney's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052 (1984). It must then be established that

but for this substandard performance, the result of the proceeding would have been different. *Id.* at 694.

Here, Respondent asserts that Petitioner's arguments regarding counsel's errors should be dismissed out of hand because they lack evidentiary support (Respondent at 12-13). This assertion avoids the issue. The fact that Petitioner's arguments create a dispute in the evidence is no reason to ignore them, simply because those very arguments create a debatable issue that is required to obtain a certificate of appealability. *Miller-El*, 537 U.S. at 342.

Simply put, despite what trial counsel has stated, Petitioner has shown a number of errors made by that attorney that clearly amount to ineffective assistance of counsel. Trial counsel failed to communicate with Petitioner throughout his court proceedings. Counsel did not investigate Petitioner's mental state, and did not argue for a diagnostic evaluation after indicating that one would be done. The consequences of Petitioner's plea were not mentioned until the end of sentencing. Counsel dismissed all possible defenses after stating that he was developing grounds to argue involuntary manslaughter. Petitioner was prejudiced by each and every one of the above errors.

Furthermore, it is well settled in California that if a criminal defendant is prejudiced by his attorney's errors, he must be given an opportunity to withdraw his plea. *People v. Johnson*, 35 Cal. App. 4th 1351 (1995). Petitioner was not given this opportunity, thereby prejudicing him further.

The above errors committed by trial counsel demonstrate a debatable issue, and therefore warranted a certificate of appealability. It was error for the lower courts not to issue one.

### C. Petitioner was Deprived of Effective Assistance of Appellate Counsel.

Respondent argues that Petitioner did not show any deficient performance that prejudiced Petitioner. This assertion is inaccurate (Respondent at 15-16). Petitioner has shown that appellate counsel delayed substantially in communicating with his successor counsel hired by Petitioner, and that this resulted in a failure to raise many issues on appeal that were highly meritorious. Under an objective standard of reasonableness, this is deficient performance by an attorney. *Strickland*, 466 U.S. at 488. Given the clear merit of the issues that were not raised due to this deficiency, Petitioner was prejudiced significantly, as there is a strong likelihood that Petitioner's conviction would have been reversed if the issues had been raised. *Id.* at 694. Such a likelihood raises a significant debatable issue, which warrants a certificate of appealability under *Miller-El*. 537 U.S. at 342. Thus, denial of the COA was error.

## CONCLUSION

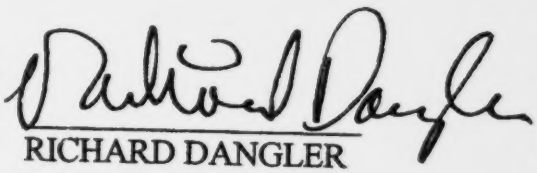
Petitioner respectfully requests this Court find that Petitioner has made a substantial showing of the denial of his constitutional rights, in that Petitioner has raised numerous debatable issues that warrant a certificate of appealability. As such, Petitioner submits that denial of the certificate of appealability was error on the part of the lower courts.

Petitioner requests this Court reverse the Judgment of the Court of Appeal to deny the request for a certificate of appealability and provide Petitioner the opportunity for federal court review on the merits of his claims.

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeal for the Ninth Circuit in denying the petitioner's request for a Certificate of Appealability.

Respectfully submitted.

DATED:
5-3-04

By: 
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